

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2566

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ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

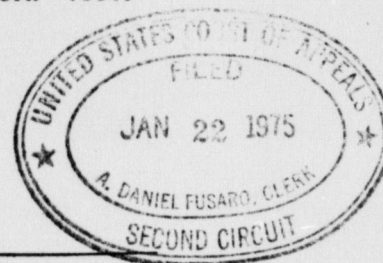
- against -

DAVID GARTNER,

Defendant-Appellant.

APPENDICES FOR DEFENDANT-APPELLANT

ROBERT BLOOM
Attorney for Defendant-Appellant
350 Broadway
New York, New York 10013
(212) 233-3300



PAGINATION AS IN ORIGINAL COPY

APPENDICES

INDEX

JUDGMENT	A1
DOCKET SHEETS	A2
INDICTMENT	A7
COURT'S DECISION DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT	A13

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JUDGMENT

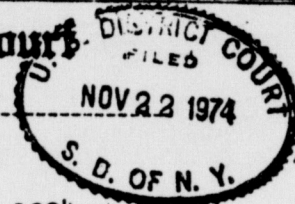
STEWART, J

JUDGMENT AND COMMITMENT (Rev. 2-68)

Cr. Form No. 28

United States District Court

Southern District of New York



United States of America

v.

DAVID GARTNER

No. 72 Cr. 1024

On this 22nd. day of November, 1974 came the attorney for the government and the defendant appeared in person and by counsel, Robert Bloom, Esq.

It is ADJUDGED that the defendant upon his plea of not guilty, and a finding of the Court of guilty."

has been convicted of the offense in counts 1 and 2 of conspiracy and violation of Federal Narcotic Laws (Title 21, USC, Sections 841(a)(1) and 841(b)(1)(A); and in count 4 of giving false testimony before a Federal Grand Jury (Title 18, Section 1623.)

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) MONTHS on count 1; pursuant to section 841 of Title 21, USC, defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement.

Imposition of sentence is suspended on count 2 and defendant is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court.

On count 4, the imposition of sentence is suspended and the defendant is placed on probation for a period of Three (3) Years, subject to the standing probation order of this Court.

Sentence imposed on each of counts 1, 2 and 4 are to run concurrently with each other.

Defendant is continued on bail pending appeal.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to

Charles E. Stewart
United States District Judge.

Clerk.

Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. Insert "in count(s) number" if required. Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. Enter any order with respect to suspension and probation. For use of Court to recommend a particular institution.

A-1

25

12-2-74

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

D. C. Form No. 127

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.:
vs.		W. Cullen MacDonald
1) STEVE GARY DISKIN cts. 1,2,3,		264-6249
2) DAVID GARTNER, a/k/a "Dave" cts. 1,2,4. 11-22-74		
3) NEIL VEENSTRA, cts. 1,2		2-2-73
4) STANLEY SILVERSTEIN, cts. 1,2.		2-2-73 For Defendant:
5) THOMAS L. PARASHAC, cts. 1,2.		2-2-73
6) EDWARD CHARLES BALETTI, a/k/a Jesse Bambu cts. 1,2.		2-2-73
7) GREGORY CHARLES OTTE cts. 1,2.		2-2-73

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed x	Clerk				
J.S. 8 mailed 4,3,4,5,7	Marshal				
Violation 72-2422	Docket fee				
Title 21, 18					
Sec. 812, 841(a)(1) & 841(b)(1)(A)					
Distribution & poss. with intent to distribute cocaine (ct. 2) 1623					
While under oath testifying falsely before a Grand Jury. (ct. 3) 2 (ct. 4)					
Conspiracy (ct. 1)					

DATE	PROCEEDINGS
9-15-72	X Filed indictment-Steve Gary Diskin-B/N ordered--Gagliardi, J.
9-19-72	X E.C. BALETTI - Deft. pleads not guilty. 10 days for motions - bail continued. --
9-25-72	X S. SILVERSTEIN - Court directs entry of not guilty plea. 10 days for motions. -- TENNEY, J.
	X D. GARTNER - Court directs entry of not guilty plea. bail continued, 10 days for motions. -- TENNEY, J.
	X G.C. OTTE - Deft. pleads not guilty, bail continued, 10 days for motions
	X T.L. PARASHAC - Deft. pleads not guilty, bail continued, 10 days for motions.
9-27-72	X Edward Charles Paletti - Filed defts. notice of motion for an order directing certain discovery, bill of particulars, etc. -- TENNEY, J.
9-28-72	X Gregg Otte - Filed defts. notice of motion Re: inspection-Ret. to be set by Court.

A-2

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DATE	PROCEEDINGS
9-29-72	X Filed notice of appearance for Thomas Parashac by atty Max Feigin 150 B'way Wo-4-5809
10-11-72	X Filed memo endorsed on motion dated 9-27-72 "Motion disposed of following argument at pre-trial confr. in accordance with Courts ruling (Baletti)-- dictated into the record SO Ordered MacMahon, J.
10-11-72	X Diskin, Gartner, Veenstra, & Silverstein- Filed memo endorsed "Motion disposed of following argument a pre-trial confr. in accordance with courts rulings dictated dictated into the record (MacMahon, J.
10-11-72	X Diskin, Gartner, Veenstra & Silverstein- Filed affidavit and notice of motion for discovery and inspection etc.
11-8-72	X Steve G. Diskin- Filed following from U.S. Magistrate, docket sheet, indictment warrant, disposition, notices of appearance, appearance bond. supporting affidavits.
11-29-72	X Edward C. Baletti- Deft withdraws plea of not guilty and now pleads guilty to count 1 only PSI ordered. Deft REMANDED Sentence as to 1-3-73 9:45 AM Stewart, J.
11-3-74	X FILED AFFIDAVIT OF K. SALAWAY TO BE RELIEVED AS ATTORNEY
11-3-74	X MEMO ENDORSED ON AFFIDAVIT OF 11-3-72 ATTORNEY IS RELIEVED. SO ORDERED
2-1-72	X Otte- Defts. (attys. Present) withdraws thier pleas of not guilty and pleads guilty to count 1 only. Pre-sentence investigations ordered. Sentence adjourned to 1-12-73 at 9:30 A.M. Bail continued. Stewart, J.
12-1-72	X Filed Transcript of record of proceedings, dated 10-10-72
12-12-72	X Gartner- Filed affidavit and notice of motion for an order to sever the de Gartner from the other defts at trial.
12-12-72	X Filed memo endorsed on motion to sever, motion for deft Gartner is granted trial will commence on 12-19-72. Stewart, J.
12-20-72	X Baletti- Filed order permitting Richard O. Arther, Pres. of Scientific Lie Detection, Inc. to visit deft. at the Fed. House of Det. NYC to conduct tests. -- Stewart, J.
2-2-73	X STANLEY SILVERSTEIN - Filed Judgment (Atty. present) the deft is sentenced to TWO YEARS on count 1... Execution of sentence is suspended. Deft placed on probation for a period of TWO YEARS, subject to the standing probation order of this Court... Count 2 is dismissed on motion of deft's counsel with the consent of the Govt... STEWART, J.
2-2-73	X NEIL VEENSTRA- Filed Judgment (Atty. present) Deft sentenced as a YOUNG ADULT OFFENDER, Sec. 5010(d) Ti. 18, U.S.C. for imprisonment on Ct. 1 for a period of 2 Years, pursuant to Sec. 3651 as amended with provision that deft be confined in a Jail type institution for a period of 2 MONTHS. Balance of the remainder of the sentence is suspended and the deft is placed on probation for a period of 2 years and a special parole of 3 years to follow. Ti. 21:841 U.S.C.... Count 2 is dismissed on motion of deft's counsel with the consent of the Govt..... Stewart, J.

— See Page 3 —
A-3

DATE	PROCEEDINGS
2-2-73	L. THOMAS PARASHAC - Filed Judgment(atty.present)deft is committed for imprisonment on ct.1 for a period of 2 years, pursuant to Sec.3651 of Ti.18, U.S.Code, as amended with the provision that the deft be confined in a JAIL type institution for a period of 2 months. Balance of the remainder of the sentence is suspended and the deft is placed on probation for a period of 2 years and a special parole of 3 years to follow. Ti.21 Sec.841 U.S.C. Count 2 is dismissed on motion of defts counsel with the consent of the Govt.....Stewart, J.
2-2-73	EDWARD C.BALETTI-Filed Judgment(Atty.present)deft is committed for imprisonment for a period of ONE YEAR, and a spceial THREE YEAR PAROLE term to follow. Ti.21 Sec. 841 U.S.C. Ct.2 is dismissed on motion of deft's counsel with the consent of the Govt.....Stewart, J.
2-2-73	GREGORY C.OTTE(Atty.present)Sentenced as a Youthful Offender Sec.5010(d)..Committed to custody of the Atty.Gen.on ct.1 for a period of TWO YEARS, pursuant to Sec.3651 of Ti.18, U.S.C., as amended with the provision that deft be confined in a JAIL type institution for a period of TWO MONTHS. Balance of the remainder of the sentence is suspended and the deft is placed on probation for a period of 2 years and a special parole of three(3)years to follow. Ti.21 Sec. 841 U.S.C...Ct.2 is dismissed on mction of deft's counsel with the consent of the Govt.....Stewart, J....
2-22-73	Baletti a/k/a Chen Kali-Mailed CJA form 20 to the A.O. approved 2-21-73 Stewart, J.
2-27-73	Baletti- Filed remand dated 2-27-73
3-5-73	Filed Transcript of record of proceedings, dated 12-11-72
4-4-73	Filed Transcript of record of proceedings, dated 11-29-72
3-16-73	E.C. Baletti- Filed judgment and commitment with Marshals return - deft. dlvd. to Fed. Det. Headquarters on 2-2-1973
1-9-73	FILED JUDGMENT & COMMITMENT OF THOMAS PARASHAC
1-19-73	Filed Transcript of record of proceedings, dated 12/1/72.
7-9-73	FILED JUDGMENT & COMMITMENT OF NEIL VEENSTRA.
6-15-73	DAVID GARTNER-Filed affdvt & order to set aside guilty plea-Ret. 6-21-73 Before Stewart
7-9-73	FILED JUDGMENT & COMMITMENT OF GREGORY OTTE.
6-26-73	Filed Transcript of record of proceedings, dated November 11, 1972

DATE

PROCEEDINGS

5-22-74 Filed Government's Proposed questions on Voir Dire

5-30-74 Filed Government's requests to charge.

7-23-74 Filed ORDER for STEVEN GARY DISKIN - Ordered that the cash bail receipt #13707 be exonerated and the deft. placed on parole, and it is further ordered court pay out of the registry of the Court the sum of \$900. to Deft. So ordered - STEWART, J.

Aug-14-74 (for 6 deft's: Bambu, Gardner, Otto, Parashac, Silverstein and Veenstra) - Filed docket sheets and documents received from Mag. Potter, including the following bail bonds:
 Jesse Otto - \$5,000. name of surety Phil Giurintano
 David Gardner - \$5,000. name of surety Stephen Diskin
 Jesse Bambu - appearance bond in the sum of \$5,000.
 Neil Veenstra - appearance bond in the sum of \$5,000.
 Stanley Silverstein - appearance bond in the sum of \$5,000. co-signed .. by Jack Silverstein
 Thomas Parashac - appearance bond in the sum of \$5,000. co-signed by Rene Parashac.

8-3-74 Filed Govt. Waiver of trial by Jury -- STEWART, J.

9-9-74 Filed Envelope ordered sealed and placed in vault in Room 602

9-3-74 Non Jury trial begun as to David Gartner only before STEWART, J.

9-4-74 Trial continued

9-9-74 Trial continued

9-10-74 Trial continued

9-11-74 Trial continued and concluded - Decision Reserved. STEWART, J.

9-23-74 DAVID GARTNER, (atty. present) Court finds the deft. GUILTY on each of Counts 1, 2 & 4 (as charged) P.S.I. ordered. Sentence adjourned to 11/4/74 at 9:30 A.M. Deft. cont'd. on bail - STEWART, J.

9-16-74 DISKIN = Filed order returning cash bail \$9,000 PHS - Werker, J.

10-16-74 GARTNER - Filed Memorandum and Order -- Deft. requested that this Court direct the govt to turn over to him an inter-office memorandum, for use in preparing inter alia, a motion to set aside the conviction on the grounds of governmental interference w/ the attorney-client relationship - Deft's request for copying or inspecting the inter-office memorandum by Special Agent Hall is denied = So ordered - STEWART, J.

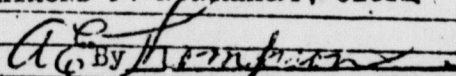
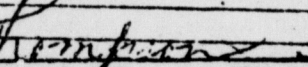
11-25-74 Filed Transcript of record of proceedings, dated *Sept 3, 4, 9, 10, 11, 1974*

A-5

DATE	PROCEEDINGS	Date Crd Judgment
1-6-74	<i>Gartner</i> Filed Transcript of record of proceedings, dated 9-3-74	
8-74	X GARTNER (atty. present) Motion argued re: vacation of conviction etc. Dec. Res. STEWART, J.	
22-74	X GARTNER - Filed MEMORANDUM . . . In any event, we conclude after examining the grand jury minutes that there was sufficient evidence on which the base the indictment against Gartner. For the reasons, as indicated, we deny all defendants's motions. So ordered - STEWART, J.	
8-74	X GARTNER (atty. Robert Bloom) present. Motions argued re: vacating conviction. Dec. Res.	
-22-74	X GARTNER - Defts. motion to vacate conviction - Denied.	
-22-74	X GARTNER -- Filed JUDGMENT (atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX(6) MONTHS on count 1; pursuant to Section 841 of Title 21, USC, defendant is placed on Special Parole for a period of THREE(3) YEARS to commence upon expiration of confinement. Imposition of sentence is suspended on count 2 and defendant is placed on probation for a period of THREE(3) YEARS subject to the standing probation order of this Court. On Count 4, the Imposition of sentence is suspended and the defendant is placed on probation for a period of THREE(3) YEARS subject to the standing probation order of this Court. Sentence imposed on each of counts 1, 2 and 4 are to run concurrently with each other. Defendant is continued on bail pending appeal. - STEWART, J. (copies issued)	
2-74	X GARTNER - Filed Notice of Appeal in forma pauperis from a judgment of U.S.D.C. STEWART, J. (n/n)	

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RAYMOND F. B. RICHARDT, Clerk


 BY 
 Deputy Clerk

A-6

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

72 CRIM. 1024

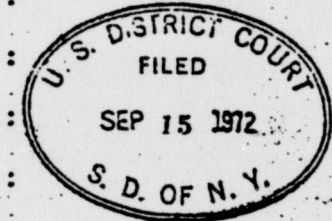
- v -

STEVE GARY DISKIN, DAVID GARTNER, a/k/a
"Dave", NEIL VEENSTRA, STANLEY SILVERSTEIN,
THOMAS L. PARASHAC, EDWARD CHARLES BALETTI,
a/k/a Jesse Bambu, CHEN KALI, a/k/a Chen
Bambu, and GREGORY CHARLES OTTE,

Defendants.

INDICTMENT

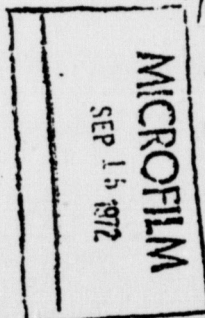
72 Cr.



The Grand Jury charges: *IN THE 1ST COUNT*

1. ~~From~~ ^{That} on or about the 1st day of January, 1972,
and continuously thereafter up to and including the date of
the filing of this Indictment, in the Southern District of
New York, STEVE GARY DISKIN, DAVID GARTNER, a/k/a "Dave",
NEIL VEENSTRA, STANLEY SILVERSTEIN, THOMAS L. PARASHAC,
you EDWARD CHARLES BALETTI, a/k/a Jesse Bambu, CHEN KALI,
a/k/a Chen Bambu, and GREGORY CHARLES OTTE, the defendants
and others to the Grand Jury unknown, unlawfully, intentionally
and knowingly combined, conspired, confederated and agreed
together and with each other, to violate Sections 812, 841(a)(1)
and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendants, unlawfully, intentionally and knowingly would
b. distribute and possess with intent to distribute Schedule I
and II narcotic drug controlled substances the exact amount
thereof being to the Grand Jury unknown in violation of Sections
312, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.



A-71

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about July 10, 1972, GREGORY CHARLES OTTE, NEIL VEENSTRA, THOMAS PARASHAC, and STANLEY SILVERSTEIN went to 85 Walker Street, New York, New York.

2. On or about July 10, 1972, EDWARD CHARLES BALETTI, Jr., a/k/a Jesse Bambu, handed a package containing cocaine to Undercover Agent John Diez.

3. On or about July 10, 1972, DAVID GARTNER, accompanied by and within the hearing of STEPHEN GARY DISKIN, twice telephoned EDWARD CHARLES BALETTI, Jr., a/k/a Jesse Bambu, twice identified himself as "Dave", and on actually speaking to the said BALETTI, did inquire about the accomplishment of their cocaine transaction, i.e., "Did everything go well tonight?".

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 10th day of July, 1972, in the Southern District of New York, STEVE GARY DISKIN, DAVID GARTNER, a/k/a "Dave", NEIL VEENSTRA, STANLEY SILVERSTEIN, THOMAS L. PARASHAC, (EDWARD CHARLES BALETTI) a/k/a Jesse Bambu, CHEN KALI, a/k/a Chen Bambu, and GREGORY CHARLES OTTE,

A8

intentionally and knowingly
did distribute and possess with intent to distribute a
Schedule II narcotic drug controlled substance, to wit,
138.2 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1)
and 841(b)(1)(A).)

COUNTS THREE

The Grand Jury further charges:

1. On or about the 9th day of August, 1972,
in the Southern District of New York, STEPHEN GARY DISKIN,
the defendant, having duly taken an oath as a witness
that he would testify truly before a competent tribunal,
to wit, a Grand Jury of the United States of America, duly
empaneled and sworn in the United States District Court
for the Southern District of New York and inquiring for
that District in a case in which a law of the United States
authorizes an oath to be administered, did unlawfully,
wilfully and knowingly, and contrary to said oath, make a
false material declaration before said Grand Jury.

2. At the time and place aforesaid, said Grand
Jury was investigating a possible violation of the narcotics
laws of the United States by STEPHEN GARY DISKIN and DAVID
GARTNER, a/k/a "Dave", the defendants.

3. It was material to said investigation to ascertain
what was said by DAVID GARTNER, a/k/a "Dave", during two
telephone calls on July 10, 1972, to the telephone at 85
Walker Street, New York, New York, where consigned cocaine
has just been offered for distribution to undercover agent
John Diez.

A-9

4. At the time and place aforesaid, in the Southern District of New York, STEPHEN GARY DISKIN, the defendant, appearing as a witness under oath before said Grand Jury, did unlawfully, wilfully and knowingly make the following false material declarations:

Q. Do you remember if your name "Steve" or "David" or "Dave" was employed?

A. No, no, no; I do not believe so. I believe that Dave just simply asked for Jesse and was told by the other party that he wasn't there and to call, the other party asked him to come up and Dave said, "no".

Q. Would it refresh your recollection if I suggested that David might have introduced himself as "Dave" and said in essence, "Did everything go well tonight?" or words to that effect?

A. No, sir. No, sir.

5. The aforesaid testimony of STEPHEN GARY DISKIN, the defendant, as he then and there well knew, was untrue.

(Title 18, United States Code, Section 1623.)
COUNT FOUR

The Grand Jury further charges:

1. On or about the 9th day of August, 1972, in the Southern District of New York, DAVID GARTNER, the defendant, having duly taken an oath as a witness that he would testify truly before a competent tribunal, to wit, a Grand Jury of the United States of America, duly empaneled and sworn in the United States District Court for the

A-10

Southern District of New York and inquiring for that District in a case in which a law of the United States authorizes an oath to be administered, did unlawfully, wilfully, and knowingly, and contrary to said oath, make a false material declaration before said Grand Jury.

2. At the time and place aforesaid, said Grand Jury was investigating a possible violation of the narcotics laws of the United States by STEPHEN GARY DISKIN and DAVID GARTNER, the defendants.

3. It was material to said investigation to ascertain what was said by DAVID GARTNER during two telephone calls on July 10, 1972, to the telephone at 85 Walker Street, New York, New York, where consigned cocaine had just been offered for distribution to undercover agent John Diez.

4. At the time and place aforesaid, in the Southern District of New York, DAVID GARTNER, the defendant, appearing as a witness under oath before said Grand Jury, did unlawfully, wilfully and knowingly make the following false material declaration:

Q. Mr. Gartner, let me, if I can go back to that second phone call and ask you again, and my question is directed to that portion of the phone call before Jesse came on and I ask you if you can recall saying anything in addition to simply asking if you could speak to Jesse?

A.

* * *

I had said nothing, in fact I never even said "David", I never even said my name, I have never said anything.

A-11

* * *

Q. And did you identify yourself by your name to that person?

A. None whatsoever.

* * *

Q. Of what you do remember you distinctly recall that you did not identify yourself by name nor did you ask Jesse Bambu if everything had gone off as planned or words to that effect?

A. Mr. Mac Donald, honest to God, I never said anything like that to Jesse Bambu.

Q. How about "Did everything go well tonight?"

A. Never said anything like that. The only thing I did say is, "Are you okay?" because he sounded very incoherent to me.

Q. In both phone calls you distinctly recall you didn't identify yourself as "Dave", which is your name?

A. That's right.

5. The aforesaid testimony of DAVID GARTNER, the defendant, as he then and there well knew, was untrue.

(Title 18, United States Code, Section 1623.)

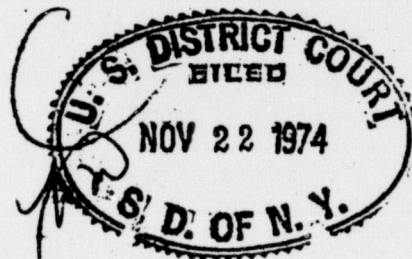
Jester D. Stolarz
FOREMAN

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

A-12

COURT'S DECISION DENYING APPELLANT'S MOTION TO
DISMISS THE INDICTMENT M-164

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
UNITED STATES OF AMERICA,

-v-

DAVID GARTNER,

Defendant.
----- x

: 72 Cr. 1024
:
:
:

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Defendant David Gartner was convicted by this court on September 23, 1974, following a trial without a jury, for unlawful sale and possession of cocaine, conspiracy and perjury.

Gartner now makes various post-conviction motions, all but one requesting that the verdict be set aside.

The principal ground on which Gartner seeks to set aside the conviction is a claim that the government unlawfully and unconstitutionally interfered with the attorney-client relationship when it intentionally tape-recorded a conversation among the defendant, his attorney Robert Bloom, and Stephen Diskin, a co-defendant turned government informer. This conversation was recorded on May 30, 1973, some ten and a half months after the arrest of Gartner and Diskin. The meeting took place at Diskin's apartment, apparently after Bloom had suggested the initial conference. On May 30th, both Gartner and Diskin were awaiting sentencing after having pleaded guilty on December 18,

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1972 to an information related to the facts set forth in the indictment. In addition, both Gartner and Diskin had agreed to cooperate with the government by serving as informers in other narcotics transactions.

What was discussed in large part at the May 30th meeting was whether or not Gartner should withdraw his guilty plea - made six months earlier - a decision that depended on the extent of cooperation to that point by Gartner. Gartner and Bloom apparently believed that the Assistant United States Attorney assigned to the case at that time was prepared to indicate to this court that Diskin had fully cooperated with the government, but that Gartner's cooperation left something to be desired. Consequently, the May 30th meeting was held so that Gartner, his attorney Bloom and Diskin could fully discuss the cooperation of both Gartner and Diskin.

The conversation was recorded with Diskin's prior knowledge and cooperation by special agent Jeffrey Hall of the Drug Enforcement Administration. Hall, who had been involved in the undercover activities leading up to the arrest of Gartner and Diskin, secreted himself in a closet in Diskin's apartment, from where he recorded the conversation. Hall testified at trial that he sought to record the conversation because he believed that Bloom would seek to get Diskin to perjure himself on Gartner's behalf regarding the extent of Gartner's cooperation with the government.

The government admits that an Assistant United States Attorney knew of the meeting in advance and had approved agent Hall's presence and taping of the conversation.

Although the government now concedes that the taping of this May 30th conversation by Hall was "unwise," it strenuously contends that the taping did not constitute an unconstitutional interference with defendant Gartner's attorney-client relationship.

A landmark case, relied upon by defendant, is Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), which held that a government agent's intrusion upon conferences between a defendant and his counsel invalidated the conviction regardless of any showing of prejudice to the defendant. The Court of Appeals set aside the conviction of the defendant for obstruction of justice and bribery, ordering a new trial (but denying the motion for acquittal in the absence "of any showing of prejudice to the defense of such a nature as would necessarily render a subsequent trial unfair to the accused"). The court found that intrusion by a government agent who purported to be helping the defense and was privy to the defendant's conversations with his counsel denied the defendant his constitutional right to effective assistance of counsel under the fifth and sixth amendments. The court noted:

[H]igh motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel. The constitution's

prohibitions against unreasonable searches and its guarantees of due process of law and effective representation by counsel lose most of their substance if the government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense. Conduct of that sort on the part of our government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand. 205 F.2d at 881.

Whether this per se rule established in the Caldwell case is followed in the Second Circuit is in dispute; the government contends that it is not followed; the defendant asserts that it is. If the per se rule applies, as defendant contends, our task is simple, since the government concedes that there has been an interference with the attorney-client relationship of the defendant. We would then be required to set aside the conviction and order a new trial. If, on the other hand, we find that the per se rule does not apply, we would order a new trial only upon a finding of prejudice to the defendant as a result of the government's surreptitious activities.

The government argues that the Second Circuit has affirmed in three recent decisions that the per se rule of Caldwell is not followed in this circuit. United States v. Arroyo, 494 F.2d 1316 (2d Cir. 1974); United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973); United States v. Mosca, 475 F.2d 1052 (2d Cir. 1972).

The defendant in his brief did not assert that the per se rule is followed in the Second Circuit, but rather sought to

distinguish the factual situations in Arroyo, Mosca, and Rosner from that in the instant case. In a supplemental brief, however, the defendant contended that Rosner stands for the proposition that once governmental intrusion is found to occur at the behest of the government, a per se rule applies.

A close examination of Rosner, however, reveals that that case does not stand for the proposition for which defendant contends. In Rosner, two co-defendants agreed to cooperate with the government in regard to other cases, and not against the defendant Rosner. However, after pleading guilty, the co-defendant informers were debriefed by the government and told the government about conversations between Rosner and his counsel to which they had been privy. The Rosner court pointed out that this information was voluntarily given by the co-defendants, and was not sought by the government at any time. Moreover, the court stressed the limited participation of the "government agents" in the counsels of the defense. After debriefing by the government, the co-defendants met with the defense a few days later, but never met with the government again until after the defendant's trial.

The Rosner court found no unconstitutional interference with the attorney-client relationship. The court did not decide whether the defendant's constitutional rights had been violated, since it found that there was no unlawful intrusion by the government. Rather, the court stressed that the informing co-defendants had voluntarily reported to the government about conversations

among them, the defendant, and his counsel. The court observed that while this informing might have constituted a breach of the common law attorney-client privilege, it did not rise to a problem of constitutional dimensions, since the government did not "unlawfully intrude on legal strategy conferences, as when it eavesdrops by electronic means ... or when it 'plants' a spy in the legal conference..." 485 F.2d at 1227 (citations omitted). The court indicated that a constitutional violation could be found only where the government intentionally interferes with an attorney-client relation.

The court then noted in dictum that a per se rule has been applied by other courts as a deterrent to the government where the government intentionally intrudes into the counsels of the defense. In such cases, the court said, the government "has stooped to conduct well below the line of acceptability." Id. The court was careful to reiterate, however, its holding in United States v. Mosca, 475 F.2d 1052 (2d Cir. 1973), that "where there is no opportunity for prejudice, even governmental intrusion will not require reversal." 485 F.2d at 1225.

In Arroyo v. United States, 494 F.2d 1316 (2d Cir. 1974), decided after Rosner, the court again observed that the Second Circuit does not follow a per se rule to set aside convictions.

Thus, we believe that Mosca, Rosner, and Arroyo compel the conclusion that the rule in this circuit requires a finding of prejudice to the defendant by the governmental intrusion. In none of those cases was a finding of prejudice demonstrated. While we realize that the factual situations in those cases were different from that in the instant case, we believe that there was no opportunity here for prejudice to the defendant. First, the taped conversation did not concern the facts of the case at all. Thus, no direct proof adduced at trial could have been affected one way or the other by the government's taping of the conversation. Second, we disagree with the defendant in his assertion that he was prejudiced by the use of the transcript at trial of the May 30, 1973 meeting. The transcript was used at trial by the government to refresh the recollection of defendant's attorney Bloom when he testified as a witness. Although much of Bloom's testimony contradicted testimony by Diskin and sought to impeach the latter's credibility, we do not feel that Bloom's testimony was affected in any material way by the government's use of the May 30th transcript to assist Bloom in refreshing his recollection. Moreover, this court had a full opportunity to assess Diskin's credibility when weighed against the contradictory statements by Bloom. Finally, we conclude that Gartner was not immediately prejudiced by the government's recording of a conversation concerning his possible withdrawal of his guilty plea, since this court allowed

Gartner to withdraw his guilty plea two months after the recorded conversation.

No prejudice to Gartner has been shown either with regard to the withdrawal of his guilty plea or with regard to the evidence presented at trial. Thus, we must deny defendant Gartner's motion to set aside the conviction because of an alleged unconstitutional interference with his right to counsel.^{1/}

We next turn to the other motions made by defendant Gartner.

Gartner's attorney states that one Coe Wells, who agreed to cooperate with the government following his arrest, had various conversations with Bloom following that arrest, and that some of the conversations concerned Gartner. Bloom thus seeks a court order directing the government to disclose what role, if any, the government played in discussions between Bloom and Wells. The government responds that "although an individual by the name of Coe Wells agreed at one point to cooperate with the government we have no knowledge of any discussions between Wells and Robert Bloom." Under these circumstances, we feel it is unnecessary for this court to order the government to disclose that which it already has revealed.

^{1/} In denying this motion, we do not intend to suggest in any way our approval or condonation of the government's actions. We appreciate the government's concession that its action was unwise, and we trust that similar activities will not recur.

US COURT OF APPEALS: SECOND CIRCUIT

USA,

Appellee,

- against -

DAVID GARTNER,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 22nd day of January 1975 at Foley Square, New York

deponent served the annexed *Appendix* upon
Paul Curran

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 22nd
day of January 1975

Robert T. Brin

James Steele

JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

